

1721662 (Migration) [2019] AATA 3766 (9 August 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1721662

MEMBER: Hugh Sanderson

DATE: 9 August 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A

Statement made on 09 August 2019 at 8:16am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – married after time of application – sharing of day to day expenses – living arrangements – undertake social activities together – sponsor’s relationship with former wife – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 17 September 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the de facto partner, as defined in s.5CB of the Act, of the sponsoring partner.

Background

5. The applicant is a citizen of Indonesia and is currently [age] years old. His father and [sisters] continue to live in Indonesia. His mother died recently. He came to Australia in July 2011 holding a Student visa.
6. The sponsor of the applicant is [Mr A] who was born in Indonesia and is currently [age] years old. His mother and [sisters] continue to live in Indonesia. He was previously married to [Ms B] and there are two children of that relationship, [Child C] currently [age] years and [Child D] currently [age] years. It was claimed the sponsor and his wife separated in 2007 and divorced each other [in] February 2013. The sponsor was granted a Subclass 100 Partner visa in 1991 and has the right to reside permanently in Australia.
7. The parties claimed that they first met each other at an Indonesian restaurant [in] October 2013. A relationship developed between them and [in] June 2015 they started to live together in a de facto relationship. They registered their relationship [in] August 2015.
8. Since claiming to have met each other, the applicant has travelled out of Australia as follows:
 - [From] December 2013 [to] 19 February 2014;
 - [From] April 2015 [to] May 2015;
 - [From] October 2016 [to] October 2016;
 - [From] December 2017 [to] January 2018;
 - [From] June 2018 [to] July 2018; and
 - [From] March 2019 [to] June 2019.
9. Since claiming to have met each other, the sponsor has travelled out of Australia on 13 occasions. On three of those occasions the applicant travelled with the sponsor or the applicant and the sponsor were travelling at the same time.
10. On the sponsor's Incoming Passenger Cards dated [in] July 2016 [and] January 2017 he identified his former wife as his emergency contact person.

11. Various documents were provided by the applicant in support of the application. This included statements by friends claiming the relationship was genuine, photos of the parties together, correspondence addressed to the parties at their joint residence, joint residential tenancy agreement and joint bank account details.
12. The delegate who considered the application noted the following issues:
 - The details in the joint bank account did not indicate the parties were pooling their financial resources or sharing their household expenses;
 - Evidence had been provided that the parties were living at the same address, however, there was limited information which would indicate the parties living arrangements are indicative of a de facto relationship;
 - The statement provided by friends provided limited information and indicated the people giving those statements had known the parties for only a short period;
 - The parties had travelled by themselves overseas and there was limited information of any other social activities; and
 - Although the parties had registered their relationship, there was limited information to indicate the parties had any commitment to a long-term relationship.
13. Taking these matters into account, the delegate was not satisfied the parties were in a genuine and continuing relationship. The delegate was not satisfied the applicant was the de facto partner, as defined in s.5CB of the Act, of the sponsoring partner. The delegate found the applicant did not meet the criteria in cl.820.211(2) and, as no alternative claims had been made, refused the application.

Information to the Tribunal

14. The parties were married [in] August 2018. The applicant provided a copy of the marriage certificate to the Tribunal. The applicant provided further documents including the following:
 - Statements of the applicant and the sponsor;
 - Statements by friends in support of the application;
 - Insurance documents in the joint names of the parties for various motor vehicles;
 - Joint bank account details;
 - Correspondence addressed to the parties at their shared residence;
 - Superannuation details of the sponsor nominating the applicant as the beneficiary of his death benefit; and
 - Photos of the parties together at various social events, including at their wedding and with various family members in Indonesia.
15. The applicant appeared before the Tribunal on 8 August 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. Three friends of the applicant and the sponsor attended to give evidence, however, the Tribunal did not require them to provide any further information in support of the application. The applicant was

represented in relation to the review by his registered migration agent who attended the hearing.

16. The parties provided consistent information as to various aspects of their relationship. This included details of the arrangements within their household, their financial affairs, their social activities and their plans for their future together. They provided consistent information of the sponsor's relationship with his children and his former wife, including details of the financial arrangements the sponsor has with his former wife. They provided details of each other's travel and the reasons why they have returned to Indonesia together and individually. They provided details of each other's family in Indonesia and their travelled to Australia.
17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, or de facto partner, as defined in s.5CB, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

19. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who has the right to reside permanently in Australia.

Are the parties in a de facto or spousal relationship?

20. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. The definition of a spouse is similar to that of a de facto partner in s.5CB but includes the requirement that the parties are married to each other under a marriage that is valid for the purposes of the Act.
22. In forming an opinion whether the parties are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. In forming an opinion as to whether the parties are in a spousal relationship regard must be had to similar circumstances as set out in r.1.15A(3). Each of the specific matters contained in r.1.09A(3) and r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

23. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married [in] August 2018 in Sydney. A copy of the marriage certificate has been provided to the Tribunal. This was after the application had been filed. On the evidence, at the time of this decision the parties are married to each

other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a). At the time of the application, however, the parties were not married and claimed to be in a de facto relationship.

Are the other requirements for a de facto or spousal relationship met?

Financial aspects

24. The parties provided details of their bank accounts. Both parties have a bank account in their sole name into which their incomes are deposited. They transfer money from these accounts into their joint bank account from which major household expenses, such as rent, insurance and other expenses are paid. The parties provided consistent details of their financial arrangements, including the payment of household expenses and their general shopping.
25. The parties do not own any significant assets on their own and so it is not surprising that they do not jointly own any significant assets. The home in which they live is rented in their joint names and they share equally in the expenses for their accommodation. Electricity and other utility accounts for their home are in their joint names. The parties were aware of each other's financial circumstances, including details of their income, current savings and regular expenses. They have nominated each other as beneficiaries under their superannuation policies.
26. The information provided by the parties' shows the parties are pooling their financial resources and have shared liabilities. They are sharing the day-to-day household expenses and are aware of each other's financial situation. The financial aspects of the relationship supports a finding that the parties are living together and have a mutual commitment to a shared life to the exclusion of all others and that their relationship is genuine and continuing.

Household

27. Since the parties commenced their de facto relationship in June 2015 they have been living together in the home that was formerly occupied by the sponsor in [Suburb 1]. Correspondence has been provided addressed to the parties both individually and jointly at their home in [Suburb 1]. The parties provided consistent information as to the arrangements within that household, including the sharing of housework and other details of the home. Evidence has been provided by friends of the parties as to social activities that have taken place in that household.
28. The evidence supports a finding that the parties are living together in a shared household indicative of them being in a genuine and continuing relationship and having a mutual commitment to a shared life to the exclusion of all others.

Social aspects

29. The parties have provided numerous photos of themselves together with other friends in various social events in Sydney. They provided consistent information of various activities they have participated in together and travel together in Australia. They are members of the same clubs and attend these clubs together. The parties have, since they commenced their relationship, travelled overseas together on at least three occasions. They have travelled overseas together and individually and with other family members on numerous occasions. The parties provided consistent information as to the reasons for this travel and the times when they have travelled individually.
30. The parties have introduced each other to their respective families in Indonesia. Family members of the applicant have travelled to Australia and spent time with the parties together.

Photos have been provided of the parties together with their families in Australia and Indonesia.

31. The parties participated in a wedding together in Australia. Although no family members attended this wedding they were aware of the wedding taking place. Friends of the parties attended the wedding and the reception celebration held after that wedding.
32. The Tribunal finds that the parties represented themselves to other people as being in a de facto relationship and now represent themselves as being married to each other. Their relationship is recognised and supported by their family and friends. They undertake numerous social activities together as a married couple. The social aspects of the relationship supported a finding that the parties live together and have a mutual commitment to a shared life to the exclusion of all others and that their relationship is genuine and continuing.

Commitment to each other

33. The parties first met each other in October 2013. They started living together in June 2015, four years ago. They registered their de facto relationship [in] August 2015. They were married [in] August 2018 and have now been married for almost a year.
34. The parties provided details of each other's lives including the arrangements the sponsor has for having continuing contact with his children from his first marriage. It is clear that the parties have discussed intimate issues with each other and that they have provided the degree of companionship and emotional support which would be expected in a genuine relationship. The parties provided details of their plans for their future together including the hope that they will be able to save sufficient funds to be able to purchase a home together.
35. The Tribunal finds that the parties display the degree of commitment to each other which would be expected in a genuine and continuing relationship where the parties have a mutual commitment to a shared life to the exclusion of all others.

Other issues

36. The delegate noted that the sponsor had nominated his former wife as his emergency contact person on his incoming passenger cards. The Tribunal accepts that this does not indicate the sponsor was in a continuing relationship with his former wife or that his relationship with the applicant not genuine. As the mother of his children, it is not surprising that the sponsor nominated his former wife as his emergency contact person. He has been able to maintain a working relationship with his former wife despite the fact that his marital relationship with her has finished.
37. The Tribunal has considered all the information before it both individually and cumulatively. The Tribunal has had the advantages speaking to both the applicant and the sponsor and comparing their evidence. The Tribunal is satisfied the weight of evidence supports a finding that the parties are living together and have a mutual commitment to a shared life to the exclusion of all others and that their relationship is genuine and continuing. The Tribunal is satisfied that the parties were committed to their relationship at the time of the application and that the commitment they had at that time is continuing at the time of this decision.
38. The parties are not related by family to each other.
39. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made. Therefore the applicant meets cl.820.211(2)(a). At

the time of this decision the applicant and the sponsor are married. For the reasons set out above, the Tribunal finds that at the time of the decision the requirements of s.5F(2) are met.

40. At the time of the application the applicant was sponsored by his de facto partner who had turned 18 years of age. He continues to be sponsored by him. Therefore the applicant meets cl.820.211(2)(b).
41. At the time of the application, the applicant held a substantive visa and therefore the criteria in cl.820.211(2)(d) is not relevant. Accordingly, the Tribunal finds that the applicant meets all the criteria in meets cl.820.211(2).
42. As the Tribunal finds the applicant meets the requirements in cl.820.211(2) and for the reasons set out above continues to meet those criteria at the time of this decision, the Tribunal finds that the applicant meets the criteria in cl.820.211 and cl.820.221.

Are the additional criteria for a de facto relationship met?

43. At the time of the application, the applicant was claimed to be in a de facto relationship with the sponsoring partner. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were both at least 18 years old.
44. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, including where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009).
45. The applicant has provided evidence that the relationship is registered under the *Births Deaths and Marriages Registration Act 1995* (NSW) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
46. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).